Supreme Court, U.S.
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No. :

In the

Supreme Court of the United States

October Term, 2002

CHARLES H. ROANE,

Petitioner,

-against-

WASHINGTON COUNTY HOSPITAL; A.F. ABDULLAH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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66 pp

QUESTION PRESENTED

WHETHER THE "TWO DISMISSAL RULE" OF FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1) ACTS AS AN ADJUDICATION ON THE MERITS WHICH BARS PETITIONER'S CLAIMS UNDER THE DOCTRINE OF *RES JUDICATA* WHEN A DISTRICT COURT IMPROPERLY TRANSFERS A FEDERAL DIVERSITY ACTION TO STATE COURT?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2002

CHARLES H. ROANE,

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-against-

WASHINGTON COUNTY HOSPITAL; A.F. ABDULLAH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Charles H. Roane respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals entered two separate opinions in this case, one dated September 10, 1999 (App., *infra*, 8a-12a) and one dated September 20, 2002 (App., *infra*, 38a-39a), the latter being the basis of the instant petition. Both opinions are unreported. Similarly, the district court also entered two separate unreported opinions in this case. The district court's first opinion and order transferred the petitioners' diversity action to state court dated December 9, 1998 (App., *infra*, 1a-3a). The district court's second opinion denied the reopening of the petitioner's federal case or, in the alternative, dismissed petitioner's medical malpractice action under the "Two

Dismissal Rule" of Federal Rule of Civil Procedure 41(a)(1)(i) on March 25, 2002 (App., *infra*, 32a-36a).

In addition, there are also state court opinions issue by the Maryland courts that are germane to the petition *sub judice*. The Circuit Court for Washington County, Maryland transferred the lawsuit back to the Federal district court on March 13, 2000 in an unpublished ruling (App., *infra*, 14a-18a). Moreover, the Maryland Court of Special Appeals issued a published decision dismissing petitioners claims based on res judicata under the "Two Dismissal Rule" (App., *infra*, 20a-29a). *Roane v. Washington County Hospital*, 137 Md.App. 582, 769 A.2d 263 (2001).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 20, 2002. A timely petition for rehearing was filed, and the requested rehearing was denied on October 29, 2002. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides that "[i]n Suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved, and no other fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The federal diversity statute is codified at 28 U.S.C. §1332 and allows citizens to have access to the federal courts where there is diversity of citizenship and when the amount in controversy exceeded $75,000.00. Finally, this Honorable Court has the power under 28 U.S.C. § 2072(a) to prescribe general rules of practice and procedure for cases in the United States district courts;

however, such rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

STATEMENT OF THE CASE

Petitioner filed a complaint initiating a civil action sounding in medical negligence with the United States District Court for the District of Maryland against the two respondents, Washington County Hospital ("Hospital") and A.F. Abdullah, M.D. ("Dr. Abdullah") on September 21, 1998. Prior to filing this complaint, Roane had filed another complaint with the district court on April 29, 1996; however, Roane subsequently voluntarily dismissed the lawsuit pursuant to Fed.R.Civ.P. 41(a)(1)(i) in light of *Davison v. Sinai Hospital of Baltimore*, 462 F.Supp. 778 (D.Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980) which required the petitioner to submit to a Maryland arbitration procedure pursuant to the Maryland Health Care Malpractice Claims Act. The Maryland Act which is codified at Md. Cts. & Jud. Proc. Code § 3-2A-01 *et seq.* requires medical malpractice claimants to go through an arbitration procedure and to have their alleged injuries certified by a medical expert. Petitioner had filed a claim with the Maryland Health Claims Arbitration Office on September 9, 1996 and, for almost two years, the parties conducted discovery under the auspices of the Health Claims Arbitration Office. Before the arbitration hearing in August of 1998, the parties executed the Election to Waive Arbitration that averted and cancelled the arbitration hearing. Accordingly, petitioner had fully complied with the Maryland Health Care Malpractice Claims Act.

After the petitioner filed his federal action with the district court, the Hospital filed a Motion to Dismiss or, in the Alternative, to Transfer to the Circuit Court for Washington County, along with a Memorandum of Points and Authorities in Support of Washington County Hospital's Motion to Dismiss.

Dr. Abdullah also filed an identical Motion to Dismiss or, in the Alternative, to Transfer to the Circuit Court for Washington County. Both motions to dismiss were apparently based on Fed. R. Civ. P. 12(b)(1) and argued that the Election to Waive Arbitration restricted petitioner's forum selection to the Maryland courts. No evidentiary hearing was held by the district court on the respondents' dual motions to dismiss, and on December 9, 1998, the district court, per U.S. District Judge Catherine C. Blake, entered a Memorandum Opinion and Order granting the alternative relief sought in respondents' motions. (App., *infra*, at 1a-3a). Though no federal statute or federal rule apparently authorizes such a procedure, the Clerk of the district court transferred all the papers in this civil case to the Circuit Court for Washington County, Maryland and all documents in the Federal Court proceeding were forwarded to the Maryland state trial court. On December 18, 1998, the Clerk for the Circuit Court for Washington County issued a receipt acknowledging the transfer and gave the case another case number. (App., *infra,* 5a). Petitioner filed a timely Notice of Appeal with the district court on December 28, 1998 as to the district court's December 9, 1998 transfer Order.

Petitioner did not file a new complaint in the Circuit Court for Washington County, Maryland. Therefore, the only complaint in the Circuit Court was the federal-styled complaint originally filed September 21, 1998 with the U.S. District Court and transferred to the state court by way of the district court's December 9, 1998 transfer Order. Nevertheless, the Hospital answered petitioner's complaint and, similarly, Dr. Abdullah also filed an answer dated January 12, 1999. Subsequently, per the Circuit Court's Scheduling Order of July 16, 1999, discovery deadlines were set and trial was scheduled in the Circuit Court for June 26, 2000 at 9:30 a.m. (App., *infra*, 6a-7a). Meanwhile, though trial had been scheduled in state court, the United States Court of Appeals for the Fourth Circuit ruled on September 10,

1999 that the Election to Waive Arbitration "was ineffective to limit Roane's malpractice action to state court. Accordingly, we vacate the district court's order and remand this case to the district court to conduct further proceedings." *Roane v. Washington County Hospital*, No. 99-1023, slip op. at 3 (4th Cir. Sept. 10, 1999).

In the Maryland court system, both the Hospital and Dr. Abdullah filed designations of experts dated September 30, 1999 and October 1, 1999, respectively with the Washington County Circuit Court. After the Fourth Circuit decision, petitioner nonetheless sought to dismiss the federal litigation in light of the firm trial date in the Maryland Circuit Court. (App., *infra*, 13a). This dismissal was approved by the district court whereupon Judge Blake who wrote "approved" on the dismissal and affixed her signature to the document as well as dating it November 12, 1999.

In November 22, 1999, the Hospital filed a Motion to Dismiss with the Maryland Circuit Court based on the "Two Dismissal Rule" of Fed. R. Civ. P. 41(a)(1) and Md. Rule 2-506. Petitioner opposed the motion to dismiss contending that the respondents had indeed answered the petitioner's complaint and, thus, the "Two Dismissal Rule" had no applicability to petitioner's medical malpractice lawsuit which had been transferred to the Circuit Court for Washington County and was almost ready for trial. The Circuit Court for Washington County, per Judge Donald E. Beachley, entered a "Ruling on Motion" and Order dated March 13, 2000 transmitting the entire case, once again, back to the U.S. District Court for the District of Maryland. (App., *infra*, 14a-18a) A timely Notice of Appeal was filed on March 16, 2000 with the Circuit Court, and an appeal was taken to the Court of Special Appeals, No. 00153 September Term, 2000. Still, pending this appeal, the district court entered an Order dated April 28, 2000 that stayed the

federal action. (App., *infra*, 19a). Specifically, the district court ordered that "[t]he case will be administratively closed, but may be reopened at the request of any party once the state appeal proceedings have been concluded." *Roane v. Washington County Hospital*, No. CCB-98-3191 (D.Md. Apr. 28, 2000)(Order).

The Maryland Court of Special Appeals which is the intermediate appellate court for the State of Maryland issued a published opinion (App., *infra*, 20a-31a) which affirmed the judgment of the Circuit Court on March 29, 2001. *Roane v. Washington County Hospital*, 137 Md.App. 582, 769 A.2d 263, *cert. denied*, 364 Md. 463, 773 A.2d 514 (2001). Though the state appellate court did not vacate or otherwise modify the Circuit Court's ruling, it construed the December 9, 1998 transfer "as a de facto refiling of the suit in State court." *Roane*, 137 Md.App. at 586, 769 A.2d at 265(App., *infra*, 22a). Still, the Maryland appellate court essentially held that the petitioner's medical malpractice claims were precluded from recovery under the "Two Dismissal Rule" of Fed. R. Civ. P. 41(a)(1)(i) and, therefore, his action was barred under the doctrine of *res judicata*. Roane, 137 Md.App. at 588-90, 769 A.2d 267-68.

On July 10, 2001, the petitioner filed a Motion to Reopen Case with the district court in accordance with the district court's Order staying the federal case. Respondents filed opposition to the motion and, again without any evidentiary hearing or oral argument, the district court denied the motion on March 25, 2002 and issued a decision relying almost entirely on the published decision issued by the Maryland Court of Special Appeals. Essentially, the district court ignored the plain language of the April 28, 2000 Order staying the federal case and held that this action which the district court had transferred back per the April 28, 2000 transfer Order had been terminated. (App., *infra*, at 32a-37a). Since the "state case subsequently was

transferred back to the state system and fully disposed of there by the Maryland Court of Special Appeals, the stay and administrative closing ceased to have any meaning or effect with regard to 98-CCB-3191." *Roane v. Washington County Hospital*, No. 98-CCB-3191, slip op. at 5-6 (D.Md. Mar. 25, 2002). (App., *infra*, at 36a). The district court held in the alternative that "if this case were reopened, it would be dismissed on the ground of *res judicata* pursuant to Fed.R.Civ.P. 41(a)(1)." Slip op. at 6.(App., *infra* at 37a) On April 9, 2002, a Notice of Appeal as filed by petitioner and, on September 20, 2002, a panel of the United States Court of Appeals for the Fourth Circuit summarily affirmed the district court's March 25, 2002 in a one page *per curiam* decision. A petition for rehearing was filed with the court of appeals on October 2, 2002, and the petition was denied on October 29, 2002. The instant petition for a writ of certiorari to this Honorable Court followed.

REASONS FOR GRANTING THE PETITION

I. THE "TWO DISMISSAL" RULE OF FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1) SHOULD NOT BE APPLIED AS A *RES JUDICATA* TO BAR PETITIONER'S MEDICAL MALPRACTICE CLAIMS AGAINST THE RESPONDENTS.

The "Two Dismissal Rule" arises from Federal Rule of Civil Procedure 41(a)(1) which reads as follows:

> By Plaintiff; By Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any

> time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Fed. R. Civ. P. 41 (a)(1). The purpose of the "Two Dismissal Rule" is to allow a plaintiff to dismiss an action without the permission of the adversary party or the court only for a brief period of time before the defendant has made a significant commitment of time and money. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990); *Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971). *See generally* 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2368, at 324 (2001). The basic purpose of the rule is to "prevent the unreasonable use of the plaintiff's unilateral right to dismiss an action" before the defendant responds. *Island Stevedoring, Inc. v. Barge CCBI*, 129 F.R.D. 430, 432 (D.P.R. 1990). The nation's courts of appeals are split on whether the rule should be narrowly construed to preserve plaintiff's rights to be heard on the merits, particularly in the absence of any intent to harass. *Compare Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co.*, 826 F.2d 637, 640-41 (7th Cir.), *cert. denied*, 485 U.S. 961 (1987)("[w]e should be especially careful not to extend the scope of such a narrow exception when the purpose of that exception would not be served"); *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017 (2d Cir. 1976)("[w]here the purpose behind the 'two dismissal' exception would not appear

to be served by its literal application, and where that application's effect would be to close the courthouse doors to an otherwise proper litigant, a court should be most careful not to construe or apply the exception too broadly") *with Warfield v. Alliedsignal TBS Holdings, Inc.*, 267 F.3d 538 (6th Cir. 2001) (district court did not abuse its discretion by determining spouse had not shown dismissal was invalid and thus subject to vacatur); *Engelhardt v. Bell & Howell Co.*, 299 F.2d 480 (8th Cir. 1962). Here, the Fourth Circuit's summary affirmation of the district court's March 25, 2002 Order clearly adopted the most stringent interpretation of Rule 41(a)(1). Unfortunately, this interpretation was applied even though the district court candidly acknowledged at the beginning of the March 25, 2002 Memorandum Opinion that "[i]t would be an understatement to say that this case has a complicated procedural history." *Roane v. Washington County Hospital*, No. CCB-98-3191, slip op. at 1 (D.Md. Mar. 25, 2002)(App., *infra*, 32a).

In the instant case, the district court's transfer Order dated December 9, 1998 was not a remand to state court from a removal but raw judicial action that is not sanctioned by any authority in Title 28, United States Code or the Federal Rules of Civil Procedure. Nevertheless, even though the transfer was involuntary from petitioner's prospective and ultimately vacated by the court of appeals on September 20, 1999, the district court eventually terminated petitioner's action, without his day in court, as a result of the transfer. In doing so, the district court ignored the petitioner's fundamental right under the Seventh Amendment to a jury trial of his medical malpractice claims.

Indeed, the court of appeals by summarily affirming the district court's Memorandum Opinion and Order dated March 25, 2002 effectively disposed of this action by, in turn, adopting the published decision of the Maryland Court of Special Appeals in *Roane v. Washington County Hospital*, 137 Md.App. 582,

769 A.2d 263 (2001). Significantly, the district court adopted one of the critical findings of the intermediate Maryland appellate court that "[t]he parties construed this transfer as a de facto filing of the suit in State court." *Roane v. Washington County Hospital*, No. CCB 98-3191, slip op. at 2 (*quoting* 137 Md.App. at 586, 769 A.2d at 265)). Relying on purported concurrent jurisdiction of the state and federal forums, the Maryland Court of Special Appeals somehow viewed the district court's December 9, 1998 transfer Order (which ordered the papers in this case to be transferred to the Circuit Court for Washington County Maryland) as somehow splitting this case into two cases whereupon "the case proceeded on two different tracks." *Id.* The fallacy with this reasoning is that petitioner's federal appeal was viewed as pursuing a medical malpractice claim separately in federal courts as well as the Maryland courts. In reality, of course, the petitioner's federal complaint, the respondents' answers, and the papers involved in litigating the petitioner's medical malpractice claims were actually being filed in one forum, namely, the Circuit Court for Washington County, Maryland. The only pleadings or papers the district court had in its docket was petitioner's Notice of Appeal of the December 9, 1998 transfer Order (App., *infra* 4a); all the other documents had been turned over to the Clerk of the Circuit Court for Washington County, Maryland. (App., *infra,* 5a)

Though the district court initially held that it lacked subject matter jurisdiction in its December 9, 1998 Memorandum and Order, it still exercised its authority to transfer petitioner's case to the Maryland judicial system instead of dismissing his action. (App., *infra,* 4a) Subsequently, the Clerk of the Circuit Court for Washington County, Maryland assumed control of the federal case per the Clerk of the Circuit Court for Washington County's "Receipt of Transferred Case" dated December 18, 1998. (App., *infra*, 5a). *See* Md. Rule 2-101(b). The case was designated as Civil Action No. 21-C-98-

005882 OT. Petitioner did not file a new complaint in accordance Md. Rule 2-101(a), but still Dr. Abdullah filed an Answer and Request for Jury Trial to Roane's complaint in the Circuit Court on January 12, 1999. Likewise, the Hospital filed an Answer on January 22, 1999. Counsel for both the Hospital and Dr. Roane participated in the Scheduling Conference, and a jury trial was scheduled in this lawsuit before the Circuit Court on June 26, 2000. However, the Circuit Court ruled on March 13, 2000 that the Fourth Circuit decision dated September 20, 1999 automatically divested it of jurisdiction and transferred the case to the U.S. District Court.(App., *infra* 14a-18a) On appeal, the Maryland Court of Special Appeals affirmed the Circuit Court's judgment but held that Roane dismissed his case under Fed. R. Civ. P. 41(a)(1)(i) by virtue of the dismissal approved by Judge Blake of the District Court on November 12, 1999. Essentially, the Maryland Court of Special Appeals held that Maryland's parallel to Rule 41(a)(1)(i), to wit, Md. Rule 2-506, precluded petitioners with what it viewed as a third action against the respondents notwithstanding the fact that the Hospital and Dr. Abdullah precipitated the lawsuit's mitosis by requesting the transfer from federal court to state court in the first place. *Roane v. Washington County Hospital*, 137 Md.App. 582, 769 A.2d 263 (2001).

Roane contended in both lower courts that the plain language of Md. Rule 2-506(a) precludes a voluntary dismissal after the Hospital and Dr. Abdulleh filed answers to the complaint. *See, e.g., Fulton v. K&M Associates*, 331 Md. 712, 629 A.2d 716 (1993). Though the Circuit Court did not expressly decide whether Md. Rule 2-506(a) applied, the Circuit Court below essentially held that Appellant's victory before the U.S. Court of Appeals for the Fourth Circuit automatically divested it of jurisdiction based upon the Fourth Circuit's mandate that "we vacate the district court's order and remand this case to the district court to conduct further proceedings."

Roane v. Washington County Hospital et al, No. 99-1023, Slip. op. at 3 (4th Cir. Sept. 10. 1999). (App., *infra*, 8a-12a) The Maryland Court of Special Appeals, however, held that the "Two Dismissal Rule" of Fed. R. Civ. P. 41(a)(1) applied even though petitioner had only filed one complaint as defined by Fed. R. Civ. P. 3 ("[a] civil action is commenced by filing a complaint with the court.")

Though the district court had transferred this civil action to the Circuit Court which assumed its broad general jurisdictional powers under Md. Cts. & Jud. Proc. Code Ann. §1-501, Petitioner never actively "split" his claim which appears to be the position adopted by the Maryland Court of Special Appeals in applying Rule 41(a)(1) and the doctrine of *res judicata*. Despite actively litigating the medical malpractice claim in the Circuit Court, Roane certainly had the right to appeal the U.S. District Court's dismissal/transfer as a matter of federal law. Once petitioner prevailed in the United States Court of Appeals for the Fourth Circuit, as a matter of judicial mechanics as well as comity, the district court would have had to request that the Circuit Court for Washington County to transfer the case back to federal court before the district court could have formally taken jurisdiction over the substantive case once again. Roane's dismissal in the U.S. District Court merely relinquished his federal diversity right that the Fourth Circuit ruled that he had; Roane certainly had no intention to waive his substantive claims that have been litigated since 1996. The purpose of the "Two Dismissed Rule: is not served when meritorious claims are dismissed not because of harrassment but judicial mistake.

Ultimately, this Honorable Court should look at what the district court did in its December 9, 1998 Order transferring this lawsuit to the Maryland courts. In the petitioner's federal action filed on September 21, 1998, the district court ruled on the

respondents' motions to dismiss or, alternatively, to transfer to the Circuit Court for Washington County, Maryland in respondents favor because "the court lacks jurisdiction to hear the case." *Roane v. Washington County Hospital*, No. CCB-98-3191, slip. op. at 3 (D.Md. Dec. 9, 1998). Essentially, the district court found it lacked subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). *See Davidson v. Sinai Hospital*, 462 F.Supp. 778 (D.Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980) (per curium). This transfer was apparently made "in the interests of justice" though again no statute allows a federal court or Article III judicial officer to transfer a case to a state forum. *Cf.* 28 U.S.C. § 1447(d) (remand is not appealable to a court of appeals); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

Indeed, under federal law, remand means "send back" and relates to removal pursuant to 28 U.S.C. § 1441 which allows a defendant to force the plaintiff to litigate a suit in federal court. Still, by the petitioner appealing the district court's December 9, 1998 transfer Order, the same district court somehow views that the petitioner's medical malpractice as pending in the federal system when the pleadings and other papers had already been physically sent to the Circuit Court for Washington County. By adopting a state court's interpretation of what the effect of the transfer was as well as Fed. R. Civ. P. 41(a)(1), the same district court tosses petitioner's medical negligence claims without a trial even though the Fourth Circuit reversed and vacated the illegal transfer Order dated December 9, 1998. To compound matters, the district court accepted the state court "file" in this case when Maryland Circuit Court Donald E. Beachley transferred petitioner's federal complaint and all the other papers in this case back to the district court on March 13, 2000 and later the district court returned the papers to the Maryland court system on April 28, 2000. (App., *infra*, 20a). The April 28, 2000 order clearly states that "[t]he case

may be reopened at the request of any party once the state appeal proceeding have concluded." (App., *infra,* 19a)

Roane's dismissal merely concluded the federal action to avoid the potential "claims-splitting" contention raised by Dr. Abdullah in his motion to dismiss subsequent to the Fourth Circuit Court of Appeals' ruling in favor of Roane. Plainly, the district court did not have the substantive case which was transferred to the Circuit Court for Washington County; Roane's complaint, along with respondents' answers. What was left of the federal action, to wit, the potential right to bring the main case back to federal court, was dismissed by the U.S. District Court on November 12, 1999 pursuant to Fed.R.Civ.P. 41(a)(2), that was approved by the U.S. District Court.

Finally, it is important to note that once the respondents filed their respective answers to petitioner's complaint, dismissal of the action could not be made as of right under Fed.R.Civ.P. 41(a)(1)(i). A plaintiff's request for a voluntary dismissal under Fed.R.Civ.P. 41(a)(2) does not specifically require that the plaintiff's request take any specific form and the court may enter an order dismissing the case under Rule 41(a)(2) whenever appropriate under the circumstances. *Morris v. City of Hobart*, 39 F.3d 1105, 1109 (10th Cir. 1994), ("Rule 41(a)(2) does not require that the plaintiff's request for dismissal take any form; it requires only that the court approve such a request for dismissal"); *United Steelworkers v. Libby, McNeil & Libby, Inc.*, 895 F.2d 421, 423 (7th Cir. 1990) (court can interpret); *Nunez v. IBP, Inc.*, 163 F.D.R. 356, 358-9 (D.Kan. 1995) (only court approval is required).

The respondents suffered no prejudice whatsoever insofar as they were notified of petitioner's intention to proceed with his medical negligence and related claims in federal court as far back as 1996 but were successful in convincing the district

court to improperly transfer the 1998 federal action to the Circuit Court for Washington County, Maryland. Indeed, both the Hospital and Dr. Abdullah answered petitioner's complaint and, if the Fourth Circuit opinion vacated the U.S. District Court's December 9, 1998 transfer Order, as the district court held in its March 25, 2002 decision, all of what transpired in the Maryland courts would transfer back to the district court along with Roane's federal-styled complaint. Unfortunately, the district court construed the vacation of her December 9, 1998 transfer order against petitioner even though he prevailed in that appeal to the Fourth Circuit. Petitioner had no power to dismiss under Fed. R. Civ. P. 41(a)(1) and, instead, such dismissal of the federal right to litigate this lawsuit in a federal forum must have been granted under Rule 41(a)(2). Though the district court admits it "approved" the purported voluntary dismissal, District Judge Blake stated that "I agree with the Court of Special Appeals that the dismissal was pursuant to 41 (a)(1)(i). *Roane v. Washington County Hospital*, No. CCB-98-3191, slip. op at 3 h.2 (D. Md. Mar. 25, 2002). (App. *infra,* 34a) Therefore, *res judicata* would not apply under the "Two Dismissal Rule."

In conclusion, it is clear that the Fourth Circuit merely adopted the district court's ruling which recursively adopted the faulty reasoning of the Maryland Court of Special Appeals that mechanically applied Fed. R. Civ. P. 41(a)(1) without any regard to the fact that the federal case, Civil Action No. CCB-98-3191, and the Maryland case, 21-C-98-005882 OT, are actually one and the same case. Moreover, it is doubtful that claim preclusion would even apply in this case in light of this Court's decision two Terms ago in *Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). In *Semtek* this Court held that Federal common law governs the claim preclusive effect of a dismissal by a federal court sitting in diversity under 28 U.S.C. §1332. Thus under the *Semtek* holding, an "adjudication upon the merits" does not necessarily entitle that judgment to a claim -

preclusive effect, and it is up to the Federal judiciary and this Honorable Court to determine the appropriate rule to ascertain whether an action is barred. *Semtek*, 531 U.S. at 506-8. Despite the intermingling of the Federal and Maryland court dockets (since the papers and pleadings in this action were either in the federal courts or the Maryland courts), there is one and only one complaint filed by Roane which was the one filed in district court on September 21, 1998. Roane's complaint was answered by the Respondents in the Circuit Court. Unfortunately, the Court of Special Appeals subscribed to the "mitosis" theory advocated by respondents that the U.S. District Court effectively "split" this lawsuit into two claims by way of its Order dated December 9, 1998.

Res judicata does not attach in this case because no "suit produced a final judgment on the merits in a court of competent jurisdiction." *FWB Bank v. Richman*, 354 Md. 472, 492, 731 A.2d 916 (1999); *Chaires v. Chevy Chase Bank*, F.S.B., 131 Md. App. 64, 74-75, 748 A.2d 34, *cert. denied*, 359 Md. 334, 753 A.2d 1031 (2000). Petitioner asserts to this Honorable Court that Rule 41(a)(1) was misapplied by the district court which merely adopted the "two track" theory of transfers set forth by the Maryland Court of Special Appeals to bar Roane's lawsuit. The district court disregarded petitioner's Seventh Amendment right to a jury trial. Accordingly, this Honorable Court should issue a writ of certiorari so that it may construe an important rule of federal civil procedure as part of its supervisory role over the Federal court system. *See, e.g. Hickman v. Taylor*, 329 U.S. 495 (1947).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark A. Cronin, Esquire
Cronin & Scardino
449 Pennsylvania Avenue
P.O. Box 205
Fort Washington, PA 19034
(215) 643-9970

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES H. ROANE,

V.

WASHINGTON COUNTY HOSPITAL, et al.

CIVIL NO. CCB-98-3191

MEMORANDUM

The defendants in this medical malpractice case have filed motions to dismiss or to transfer to the Circuit Court for Washington County, Maryland, which the plaintiff has opposed. A conference call was held on December 4, 1998, to discuss the issue. For the reasons that follow, the motion will be granted and the case will be transferred.

Prerequisite to the federal court's exercise of diversity jurisdiction over a medical malpractice case is the plaintiff's compliance with the Maryland Health Care Malpractice Claims act ("the Maryland Act"), Md. Code Ann., Cts. & Jud. Proc., §§ 3-2A-o1 to 3-2A-09. See Davison v. Sinai Hosp., 462 F. Supp. 778 (D. Md. 1978), aff'd, 617 F.2d 361 (4th Cir. 1980) (per curiam). The Maryland Act requires submission of a medical malpractice claim to an arbitration panel before filing a complaint in either state or federal court. See generally Attorney General v. Johnson, 282 Md. 274, 279-80, 385 A.2d 57, 60-61 (1978), overruled on other grounds by, Newell v. Richards, 323 Md. 717, 734 594 a.2d 1152, 1161 (1991).

Arbitration may be waived by mutual consent of all parties before the hearing of a claim, § 3-2A-06A, or by one party if certain deadlines are met and the claimant has filed a certificate of qualified expert, § 3-2A-06B.

The plaintiff initially brought this case in the United States District Court for the District of Maryland, his preferred forum, but dismissed it voluntarily upon recognizing the applicability of the Davison decision. He then submitted a claim to the Maryland Health Claims Arbitration Office, as required under the Maryland Act. Subsequently, the parties filed in that office an Election to Waive Arbitration, apparently drafted by defense counsel but signed by all counsel, stating, in relevant part, that "all the parties hereto, through their attorneys, mutually agree to waive arbitration of this matter to the Circuit court for Washington County, Maryland." See Def.'s Motion, Exhibit A. The plaintiff, who asserts that he did not intend the waiver to limit him to state court, see Pl.'s Opposition, filed this complaint on September 21, 1998, and the motions to dismiss followed:

Upon review, it appears that the court lacks jurisdiction to hear this case. Compliance with the Maryland Act is a jurisdictional prerequisite, see Davison, supra, and there has been no mutual or otherwise effective waiver that would permit the action to proceed in federal court. The waiver to which the parties agreed appears to limit any further proceedings in this matter "to the Circuit Court for Washington County, Maryland." Nothing in the Maryland Act indicates that such a limited waiver is contrary to the Act's purposes or beyond the scope of the parties' power to waive arbitration. While the Act clearly envisions that mutually waived claims may be brought in federal court, see § 3-2A-06A (c), the Act does not compel this choice of forums. To the extent that the parties' waiver is valid, therefore, the plaintiff has given up his right to this court's jurisdiction. Even if the waiver is not valid this court

cannot hear this case for the reasons articulated in Davison.

Whether the plaintiff still has the option to dismiss this case entirely and resume proceedings in the Health Claims Arbitration Office, so that he may once again file his complaint in federal court, is not clear. The Court believes, however, that this question should be resolved by the appropriate state tribunal.

Accordingly, in the interest of justice, the defendants' alternative request for a transfer to the Circuit Court for Washington County will be granted by separate order.

12/9/98
Date

S/ Catherine C. Blake
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES H. ROANE,

V.

WASHINGTON COUNTY HOSPITAL, et al.

CIVIL NO. CCB-98-3191

ORDER

For the reasons stated in the accompanying Memorandum it is hereby ORDERED that:

1. This case is Transferred to the Circuit Court for Washington County; and
2. The Clerk shall mail copies of this Order and the accompanying Memorandum to counsel of record.

12/9/98
Date

S/ Catherine C. Blake
United States District Judge

CIRCUIT COURT FOR WASHINGTON COUNTY
Dennis J. Weaver
Clerk Of The Circuit Court
P.O. Box 229
Hagerstown, MD 21741-0229
(301) 733-8660, TTY for Deaf: (301) 791-2632
Civil (301) 790-4972 Criminal (301) 790-7941

Case Number: 21-C98-005882 OT

CIVIL

Roane vs Washington County Hospital, et al

RECEIPT OF TRANSFERRED CASE

The above-entitled case has been received in the Circuit Court for Washington County and filed on 12/18/98.

Please note the Circuit Court number is civil action number 21-C-98-005882 OT and have this number on all pleadings to be filed in this matter.

S/ Dennis J. Weaver
Clerk Of The Circuit Court

Date Issued: 12/18/98

To: Mark Andrew Cronin, Esq.
449 Pennsylvania Ave.
Ft. Washington, PA 19034

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

CHARLES H. ROANE,

Plaintiff,

vs.

ADEL F. ABDULLAH, M.D. et al.

Defendants.

SCHEDULING ORDER

It is ORDERED, by the Circuit Court for Washington County, that trial by JURY is scheduled for June 26, 2000 at 9:30 a.m. and is estimated to require five (5) days. Plaintiff's experts shall be named no later than August 2, 1999. Defendants' experts shall be named no later than October 1, 1999. All discovery shall be concluded no later than December 15, 1999 and dispositive motions shall be filed no later than January 14, 2000. FAILURE TO COMPLETE DISCOVERY WILL NOT BE CAUSE FOR POSTPONEMENT OF TRIAL; and it is further

ORDERED, that a settlement/pre-trial conference shall be held on May 12, 2000 at 3:00 p.m. Counsel shall file written statements concerning those matters set forth in Rule 2-504.2, and motions in limine, no later than 5 days before this conference. All parties necessary to effect a binding settlement must attend or be immediately available by telephone.

Upon any settlement or dismissal, it is the responsibility of counsel for the Plaintiff to notify not only the Clerk of Court but also the Assignment Clerk (301-791-3118).

Date: July 16, 1999.

S/ Fred C. Wright, III
Administrative Judge

cc: Mark A. Cronin, Esq.
Conrad W. Varner, Esq.
Michael I. Joseph, Esq.
Alexander Ferrante, Esq.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES H. ROANE,
Plaintiff-Appellant,

v.

WASHINGTON COUNTY HOSPITAL,
A.F. ABDULLAH,
Defendants-Appellees.

No. 99-1023

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Catherine C. Blake, District Judge.
(CA-98-3191-CCB)

Submitted: July 20, 1999

Decided: September 10, 1999

Before WILLIAMS and MURNAGHAN, Circuit Judges,
and PHILLIPS, Senior Circuit Judge.

Vacated and remanded by unpublished per curiam opinion.

COUNSEL

Sharon N. Horner, Richmond, Virginia; Mark A. Cronin, CRONIN & SCARDINO, Fort Washington, Pennsylvania, for Appellant, Michael I. Joseph, GODARD, WEST & ADELMAN, Rockville, Maryland; Frederick W. Goundry, III, VARNER, KASLICK & GOUNDRY, Frederick, Maryland, for Appellees.

ROANE V. WASHINGTON COUNTY HOSPITAL

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Charles H. Roane appeals from the district court's order transferring his medical malpractice action to the state court pursuant to the language in his waiver of arbitration limiting that waiver to the state court. On appeal, he contends that the language in the waiver of arbitration does not limit his right to sue the Defendants in federal court. We find that the plain language of the Maryland statute does not allow such a forum selection clause, and, therefore, vacate the district court's order and remand the case to the district court for further proceedings.

In April 1996, Roane filed a complaint in the United States District Court for the District of Maryland, in which he alleged that Washington County Hospital and Dr. A.F.

Abdullah committed medical malpractice and caused serious injury to Roane's right arm during carpal tunnel surgery. After the Defendants moved to dismiss the complaint based on Roane's failure to submit his claim for arbitration pursuant to the Maryland Health Care Malpractice Claims Statute, Md. Cts. & Jud. Proc. Cod Ann. §§ 3-2A-01 to 3-2A-09 (Michie 1998), Roane voluntarily dismissed the complaint.

Roane then filed a claim with the Maryland Health Claims Arbitration Office. Subsequently, the parties filed an "election to waive arbitration." The election states: "Pursuant to Md. Cts. & Jud. Proc. Code Ann. § 3-2A-06A, all the parties hereto, through their attorneys, mutually agree to waive arbitration of this matter to the Circuit court for Washington County, Maryland."

Roane refiled his malpractice complaint in the district court, based upon diversity jurisdiction. The Defendants moved to dismiss the complaint or, in the alternative, to transfer the case to the state court. The Defendants asserted that the "election to waive arbitration" states that arbitration is waived so that claims could be filed in the Circuit Court for Washington County; it is not valid for filing claims in federal court. Following a conference call to discuss the issue, the district court granted the Defendants' motions and transferred the case to the Circuit Court for Washington County. Roane appeals.

The Maryland Health Care Malpractice Claims Statute requires that all malpractice claims alleging damages in excess of $20,000 be subject to arbitration and be initially filed with the Health Claims Arbitration Office. *See id.* §§ 3-2A-02(a), 3-2A-04(a). Arbitration is a condition precedent to filing a malpractice action. *See Davison, v. Sinai Hosp. Of Baltimore,*

Inc., 462 F. Supp. 778 (D. Md. 1978), *aff'd.* 617 f.2d 361 (4th cir. 1980); *See also Woods v. Holy Cross Hosp.*, 591 F.2d 1164 n. 7 (5th Cir. 1979).

The Arbitration Statute provides that the parties may agree to waive arbitration, *See* Md. Cts. & Jud. Proc, Code Ann § 3-2A-06A. Here, the parties "Mutually agree[d] to waive arbitration of this matter to the Circuit Court for Washington County, Maryland." The Defendants argue, and the district court found, that by limiting the waiver to the Circuit Court for Washington County, Maryland, the parties waived their right to file the complaint in the United States District court, and instead selected the forum for litigation of the malpractice action.

However, § 3-2A-06A(a) of the Maryland Health Care Malpractice Claims Statute provides in part that "parties may agree mutually to waive arbitration of the claim, and the provisions of this subsection then shall govern all further proceedings on the claim." Section 3-2A-06 (c)(1) then provides that "[w]ithin 60 days after filing the election to waive arbitration, the plaintiff shall file a complaint and a copy of the election to waive arbitration with the circuit court or United States District Court." Because § 3-2A-06A(a) does not allow parties to opt out of the provisions of § 3-2A-06A, and because subsection (c) provides that following waiver of arbitration, the complaint may be filed in the state *or the federal court,* we find that forum selection provision of the waiver was ineffective to limit Roane's malpractice action to state court. Accordingly we vacate the district court's order and remand this case to the district court to conduct further proceedings. We dispense with oral argument because the facts and legal contentions are

adequately presented in the materials before the court and argument would not aid the decisional process.

VACATED AND REMANDED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES H. ROANE,

Plaintiff,

v.

WASHINGTON COUNTY HOSPITAL
and A.F. ABDULLAH, M.D.,

Defendants.

No. CCB-98-3191

VOLUNTARY DISMISSAL

Plaintiff, Charles H. Roane, by and through his undersigned counsel, hereby dismisses the above-captioned action.

Respectfully submitted,

S/ Mark A. Cronin, Esq.
Cronin & Scardino
449 Pennsylvania Avenue
P.O. Box 205
Fort Washington, PA 19034
(215) 643-9970

Attorney for Plaintiff
Charles H. Roane

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

CHARLES H. ROANE,

Plaintiff,

vs.

WASHINGTON COUNTY HOSPITAL, et al

Defendants.

CASE NO. 21-C-98-5882-OT

RULING ON MOTION

PROCEDURAL HISTORY

On April 29, 1996, Plaintiff filed a Complaint in the United States District Court for the District of Maryland. That action was styled as *Roane v. Washington County Hospital, et al.*, Civil No. B-96-1322. Plaintiff then voluntarily dismissed the action on June 5, 1996, pursuant to Federal Rules of Civil Procedure 41(a)(1)(i). Plaintiff subsequently pursued a claim with the Health Claims Arbitration Office; however, on July 29, 1998, all parties agreed to waive arbitration and purportedly agreed to move the case to the Circuit Court for Washington County, Maryland.

Rather than filing in state court, the Plaintiff again filed a Complaint in the United States District Court on September 17, 1998. This case was styled as *Roane v. Washington County Hospital, et al.*, Civil No. CCB-98-3191. Defendants filed Motions to Dismiss or Transfer to the Circuit Court for Washington County. The district court transferred the case to

the state circuit court in a December 9, 1998 Order signed by the Honorable Catherine C. Blake. This Court accepted the filing on December 18, 1998 styling the case as *Roane v. Washington County Hospital, et al.*, 21-C-98-5882-OT.

Plaintiff then noted an appeal to the United States Court of Appeals for the Fourth Circuit, challenging Judge Blake's Order which transferred the case to the state court. On September 10, 1999, the Fourth Circuit Court of Appeals held that the forum selection clause of the waiver was invalid, vacated the district court's order, and remanded the case for further proceedings. *See Roane v. Washington County Hospital, et al.*, No. 99-1023, slip op. At 3-4 (4th Cir. 1999). Plaintiff filed yet another voluntary dismissal with the United states District Court on November 5, 1999.

On February 11, 2000, this Court heard arguments on the Defendants' Motions to Dismiss and Plaintiff's Response thereto.

DISCUSSION OF LAW

Based upon the procedural history of this case outlined above and application of the relevant decisional law, it is clear that this court is not the appropriate forum for trial. Maryland has long recognized the "law of the case" doctrine. *Waters v. Waters*, 28 Md. 11 (1867). The doctrine was succinctly state by *Waters* Court:

> No principle is better established than that a decision of the Court of Appeals once pronounced in any case is binding upon the court below and upon this court in the subsequent proceedings in the same case, and cannot be disregarded or called in question. It is the law of the case binding and conclusive upon

> the parties not open to question or examination afterwards in the same case.

Id. at 22. An outgrowth of the "law of the case doctrine" is the "mandate rule", which has been described as follows:

> Appellate courts often remand a case to the lower federal courts for further proceedings. It is often stated that the decision of an appellate court on an issue of law becomes the law of the case on remand. This is the almost universal language describing the law determined by the mandate. Although this terminology has been widely adopted, the Supreme Court has noted that the mandate rule is not, strictly speaking, a matter of law of the case. The nondiscretionary aspect of the law of the case doctrine is sometimes called the 'mandate rule' and this terminology is more precise than the phrase 'law of the case.' On remand, the doctrine of the law of the case is rigid; the district court owes obedience to the mandate of the Supreme Court or the court of appeals and must carry the mandate into effect according to its terms. (footnotes omitted.)

18 James Wm. Moore, et al., Moore's Federal Practice § 134.23[1][a](3d.ed. 1999). These principles were expressly recognized by the Court of Appeals in *Tu v. State*, 336 Md. 406, 416-17 (1994). *See also Kline v. Kline*, 93 Md.App. 696, 700 (1992). Moreover the U.S. Court of Appeals for the Fourth Circuit as recently as last year applied the "law of the case" doctrine and the "mandate rule". In *U.S. v. Aramony*, 166 F.3d 655 (4th cir. 1999), the Court held that the decision of the

appellate court is the law of the case and, with three exceptions, "must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal". *Id.* at 661. None of the three exceptions enunciated by the *Aramony* court apply to the case under scrutiny.

Applying these established principles, it is clear that this case cannot proceed in state court. In the case at bar, the Fourth Circuit vacated the U.S. District Court's Order transferring the case to the Circuit Court for Washington County. In its opinion, the Fourth Circuit expressly held that the plaintiff was not required to prosecute his malpractice action in state court. *See Roane v. Washington County Hospital*, No. 99-1023, Slip. Op. At 2 (4th cir. 1999). Accordingly, the Fourth Circuit remanded the case to the U.S. District Court for further proceedings. Under the "law of the case" doctrine, the Fourth Circuit's decision immediately divested the Circuit Court for Washington County of any jurisdiction as further proceedings were unequivocally contemplated in the U.S. District court. The Clerk of this Court shall therefore promptly transmit this file to the Clerk of the U.S. District Court for the District of Maryland (Northern Division) for further proceedings consistent with the Fourth Circuit's decision in *Roane v. Washington County Hospital*, No. 99-1023 (4th Cir. 1999).

Dated: March 13, 2000

S/ Donald E. Beachley
Judge

cc: Mark A. Cronin, Esquire
Alexander Ferrante, Esquire
Michael I. Joseph, Esquire

Conrad W. Varner, Esquire
IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

CHARLES H. ROANE,

Plaintiff,

vs.

WASHINGTON COUNTY HOSPITAL, et al.,

Defendants.

ORDER

For the reasons stated in the Ruling on Motion, it is, this 13th day of March, 2000 by the Circuit Court for Washington County, Maryland,

ORDERED, that the Clerk shall promptly transmit this file to the Clerk of the U.S. District Court for the District of Maryland (Northern Division) for further proceedings consistent with the Fourth Circuit's decision in *Roane v. Washington County Hospital*, No. 99-1023 (4th Cir. 1999).

S/ Donald E. Beachley
Judge

cc: Mark A. Cronin, Esquire
Alexander Ferrante, Esquire
Michael I. Joseph, Esquire
Conrad W. Varner, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES ROANE

v.

WASHINGTON COUNTY HOSPITAL, et al

CIVIL NO. CCB-98-3191

ORDER

Counsel have requested that this case be stayed pending the outcome of the appeal filed with the Maryland Court of Special Appeals for review of Judge Beachley's March 13, 2000 Order. I am in agreement that the interests of judicial economy and reducing costs for the litigants are best served by granting the stay. The case will be administratively closed, but may be reopened at the request of any party once the state appeal proceedings have been concluded.

Accordingly, it is hereby **Ordered** that:

1. This case is **Stayed** and **Administratively Closed** pending the outcome of appeal proceedings in the case titled Charles R. Roane v. Washington County Hospital, et al., No. 00153, September Term, 2000; and

2. Copies of this Order shall be mailed to counsel of record.

April 28, 2000
Date

S/ Catherine C. Blake
United States District Judge

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 00153

September Term, 2000

CHARLES H. ROANE

v.

WASHINGTON COUNTY HOSPITAL, et al.

Hollander,
Sonner,
Thieme, Raymond, G., Jr.,
(Retired, specially assigned)

JJ.

Opinion by Sonner, J.

Filed: March 29, 2001

The procedural questions raised in this appeal stem from a medical malpractice claim. Appellant, Charles H. Roane, alleged that appellees, Washington County Hospital and Dr. A.F. Abdullah, injured his right arm during surgery for his carpal tunnel syndrome. The Circuit Court for Washington County dismissed the claim pursuant to the law of the case doctrine. We affirm the dismissal, but for the reason that *res judicata* barred the claim.

Background

Roane filed his first medical malpractice complaint on April 29, 1996 in the U.S. District Court for the District of Maryland. The claim was docketed as Civil Action No. B-96-1322. Appellees moved to dismiss the complaint because Roane failed to submit it for arbitration as required by Maryland Code, Courts and Judicial Proceedings Article, § 3-2A-04, and *Davison v. Sinai Hospital*, 462 F. Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980). Roane then voluntarily dismissed the complaint, pursuant to Federal Rule of Civil Procedure 41 (a) (1) (i).

Roane refiled the claim in the Maryland Health Claims Arbitration Office on September 9, 1996. Following nearly two years of discovery, the parties agreed to waive arbitration and to pursue the matter in the Circuit Court for Washington County. True to his original instinct, however, on September 21, 1998, Roane filed the second complaint in the federal district court, not the State circuit court. This complaint was docketed as Civil Action No. CCB-98-3191. It mirrored the first federal complaint.

Appellees moved to dismiss the second complaint on the ground that Roane's filing in federal court contravened the forum selection clause of the parties' waiver agreement, which set the case for State circuit court. They requested dismissal of

the action, or, in the alternative, transfer of the case to the State court. Following a conference call with the parties, the district court accepted appellees' argument and, on December 9, 1998, ordered the case "[t]ransferred to the Circuit Court for Washington County." the circuit court "received" the case and designated it as Civil Action NO. 21-C-98-00582 OT. The parties construed this transfer as a de facto refiling of the suit in State court.

At this point, the case proceeded on two different tracks. Roane pursued the claim in federal court by appealing the district court's transfer. In circuit court, he moved, unsuccessfully, to stay the circuit court proceedings during the pendency of the federal appeal. Appellees answered Roane's complaint in circuit court, and the parties prepared for trial. The circuit court also handled a number of substantive matters, including a motion for summary judgement and two motions for intervention. At the federal level, on September 10, 1999, the U.S. Court of Appeals for the Fourth Circuit ruled that the plain language of the Health Care Malpractice Claims Act precluded the forum selection clause agreed to by the parties. Accordingly, it vacated the district court's transfer of the case to State court and remanded the matter to the district court for further proceedings.

Dr. Abdullah then moved to dismiss the suit in circuit court. He argued that the U.S. Court of Appeals' decision rendered the State action invalid, and that Roane's pursuance

of the same cause of action in both state and federal court

constituted improper claim splitting.[1] In November 1999, Roane voluntarily dismissed his second federal complaint, Civil Action No. CCB-98-3191. The parties dispute whether this dismissal was at Roane's behest, pursuant to Federal Rule of Civil Procedure 41 (a) (1) (i), or by order of the federal court, pursuant to Rule 41 (a) (2). We note that the dismissal paper was drafted by Roane's counsel, titled "Voluntary Dismissal," and signed by Roane's counsel. The district court judge wrote "approved" on the paper and signed her name.

On November 23, 1999, Washington County hospital moved to dismiss the claim in circuit court, arguing that under Rule 41 (a) (1) and the Maryland counterpart, Rule 2-506(c), Roane's second voluntary dismissal of the federal claim operated as an adjudication on the merits, which served as *res judicata* to the State action. Dr. Abdullah joined in the Hospital's motion. The circuit court granted the dismissal on March 13, 2000, not adopting appellees' arguments, but ruling that, "[u]nder the 'law of the case' doctrine, the Fourth Circuit's decision immediately divested the Circuit Court for Washington County of any jurisdiction as further proceedings were unequivocally contemplated in the U.S. District Court."

---

[1]The typical splitting of a claim occurs when a party pursues certain damages in one suit and other damages in another suit, all of which are based on the same nucleus of facts. *See Jones v. Speed,* 320 Md. 249, 257-59, 577 A.2d 64 (1990). That is not what Roane did here; he pursued the same claim in both federal and State court. On appeal, Dr. Abdullah clarifies this argument to be that the Healthcare Malpractice Claims Act, - § 3.2A-06B (f) precluded Roane from filing his claim in two separate courts at the same time.

Discussion

The Law of the Case Doctrine:

At the outset, the parties agree that the trial court erred in basing its ruling on the law of the case doctrine. That doctrine provides that "once a decision is established as the controlling legal rule of decision between the same parties in the same case it continues to be the law of the case." *Kline v. Kline*, 93 Md. App. 696, 700, 614 A.2d 984 (1992); *See also Hagez v. State,*131 Md. App. 402, 418, 749 A.2d 206, *cert. denied*, 359 Md. 669, 755 A.2d 1140 (2000). The mandate rule, a subset of the doctrine, presumes that on remand, a trial court will follow the law of the case as established by the appellate court on appeal. *Tu v. State*, 336 Md. 406, 416-17, 648 A.2d 993 (1994). "Neither questions that were decided nor questions that could have been raised and decided on appeal can be relitigated." *Kline*, 93 Md. App. At 700.

The federal courts, like Maryland courts, apply the law of the case doctrine and the mandate rule. *See Agostini v. Felton*, 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Christianson v. Colt Indus. Operating Corp.*,486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988); *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912); 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4478 (1981 & 2000 Supp.). The circuit court's analysis foundered, however, because both concepts apply only *within a given court system*. Thus, a federal appellate court's decision binds a State trial court, but the decision by the Fourth Circuit, U.S. Court of Appeals could not bind the Circuit Court for Washington County. While the circuit court traveled the wrong path, however, as explained below, it reached the right result, and we ordinarily affirm under those circumstances. *See Tiller Constr. Corp. v. Nadler,* 334 Md. 1, 16-17, 637 A.2d

1183 (1994); *Hurt v. Chavis*, 128 Md. App. 626, 640, 739 A.2d 924 (1999); *Pope v. Board of Sch. Comm'rs*, 106 Md. App. 578, 591, 665 A.2d 713 (1995).

Concurrent Jurisdiction, Voluntary Dismissals & Res Judicata:

The federal courts and Maryland State courts often possess concurrent jurisdiction.

> The Supreme Court laid down the ground rules to be applied in cases of concurrent jurisdiction between State and Federal courts nearly 60 years ago, holding in *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 55 S.Ct. 386, 389, 79 L.Ed. 850 (1935), that :
>
> > Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other . . . .

> It has generally been recognized that this doctrine is not one of Constitutional imperative, but rather one of comity, or accommodation.

Cavaliere v. Town of North Beach, 101 Md. App. 319, 328-29, 646 A.2d 1058 (1994). Thus, in this case, Roane's claim could properly proceed in the Fourth Circuit and Washington County until one of those jurisdictions rendered an adjudication on the merits that had *res judicata* effect. One such kind of adjudication derives from the procedural rule on voluntary dismissals.

Federal Rule of civil Procedure 41 (a) states in part:[2]

> (a) **Voluntary Dismissal: Effect Thereof.**
>
> (1) **By Plaintiff; By Stipulation.**
> Subject to the provisions of Rule 23 (e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or any state an action based

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[2] Maryland Rule 2-306 (2001) duplicates the federal rule in language and purpose.

on or including the same claim.

> (2) **By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(Emphasis added.) In this case, appellees had answered the complaint in the State action, so Roane could not voluntarily dismiss the claim in that jurisdiction. When he filed the second dismissal, however, appellees had not answered the complaint in district court. By the plain language of Rule 41 (a), therefore, the second dismissal precluded further adjudication of the claim in federal court.

Res judicata, or claim preclusion, bars a plaintiff from pursuing a second action against the same defendant based on the same cause of action. *FWB Bank v. Richman,* 354 Md. 472, 492, 731 A.2d 916 (1999). It applies when: (1) the parties in the second litigation are the same, or in privity, with the parties in the earlier case; (2) the second suit presents the same cause of action as the first suit; and (3) the first suit produced a final judgment on the merits in a court of competent jurisdiction. *Id., Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md. App. 64, 74-75, 748 A.2d 34, *cert. denied*, 359 Md. 334, 753 A.2d 1031 (2000). Roane's State claim possessed all three of these requirements. Thus, the second dismissal in federal court also precluded further litigation of the claim in State court.

Roane reminds us that the voluntary dismissal rule is intended to prevent plaintiffs from harassing defendants with multiple filings and dismissals; it contemplates indecisive or

vindictive plaintiffs, who keep their opponents in perpetual fear of litigation. *See ASX Inv. Corp. v. Newton*, 183 F.3d 1265, 1268 (11th Cir. 1999). Here, Roane argues, the federal suit did not harass appellees since, at the time of the second dismissal, the parties had already expended significant energy litigating the claim in State court. While we appreciate the strength of his argument, the plain language of Rule 41 dictates a different result. Nor can we fashion a sensible exception to the rule that would salvage Roane's suit. *See New Jersey v. Strazzella*, 331 Md. 270, 282, 627 A.2d 1055 (1993) ("When a party contends that a court should disregard the express language of a carefully-drawn rule of procedure, that party bears a heavy burden of showing that departure from the plain language is justified.") (*quoting Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co.*, 826 F.2d 637, 640 (1987)).

Roane also contends that the district court dismissed the complaint by its own order pursuant to Rule 41 (a) (2). Accordingly, he persists, no prejudice attached to the dismissal. Roane refers us to *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994) for the proposition that a dismissal under 41 (a) (2) need not take any particular form. In that case, plaintiff drafted a voluntary dismissal paper when the parties agreed to a settlement. The district court cleared the case from the docket with an administrative closing order, rather than a dismissal order. "[U]nder the circumstances," the appellate court found the closing order sufficient for purposes of 41 (a) (2).

Morris is readily distinguishable from Roane's case, First, here, there is no court order for us even to decipher. Second, Roane's voluntary dismissal reads like a pleading, not like a court order, and the circumstances do not indicate that the parties intended the paper to be a court order. Roane points to the judge's signature on the dismissal as evidence of its directive effect. We read that signature, however, as mere

acknowledgment and approval of Roane's action. Indeed, a judge signed the 1996 dismissal in the same fashion, and there is no contention that that dismissal was by order of the court. Moreover, Roane's argument on appeal is disingenuous, given that he defined the second dismissal as a filing under 41 (a) (1), not 41 (a) (2), in his opposition to Dr. Abdullah's motion to dismiss.

Roane further argues, creatively, but in error, that when the district court transferred the case to State court, it sent the "substantive case," and retained only a procedural right - "the potential to bring the main case back to Federal court." In his view, therefore, the second dismissal was not an adjudication on the merits because it dismissed only the procedural right to pursue the claim in federal court. Roane does not offer, and we do not find, any support for this argument. The whole claim proceeded in both the State and federal courts until the federal court reached a result that weighed upon the State suit.

The Judicial Estoppel Doctrine:

Roane next seeks refuge from the import of the voluntary dismissal rule in the doctrine of judicial estoppel. That doctrine precludes a party who successfully pursued a position in a prior legal proceeding from asserting a contrary position in a later proceeding. *Mathews v. Gary*, 133 Md. App. 570, 579, 758 A.2d 1019, *cert. granted*, 362 Md. 187, 763 A.2d 734 (2000). To explain further:

> "If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of law, available only between those who consented to

> its exercise, could be set at naught at all. . . . It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of litigation, must act consistently with it; one cannot play fast and loose."

Winmark Ltd. Partnership v. Miles & Stockbridge, 345 Md. 614, 620, 693, A.2d 824 (1997) (Quoting *Kramer v. Globe Brewing, Co.*, 175 Md. 461, 469, 2 A.2d 634 (1938). The gravaman of a judicial estoppel claim is one party's inconsistency prejudicing his or her opponent's case. *Wilson, v. Stanbury*, 118 Md. App. 209, 215, 702 A.2d 436 (1997). The doctrine in no way hinders parties from vigorously pursuing their claim, including alternative theories of the case.

Roane contends appellees pursued inconsistent positions by first arguing in 1998 that the forum selection clause of the waiver agreement directed the case be tried in State circuit court, and then arguing in 1999 that the circuit court lacked jurisdiction to hear the case. While it is true that appellees initially argued that the district court should not hear the claim, Roane did not rely on that argument to his detriment. To the contrary, he fought appellees on the validity of the forum selection clause and, ultimately, prevailed before the U.S. Court of Appeals. Moreover, following the voluntary dismissal, appellees did not argue that the circuit court lacked jurisdiction to hear the claim, but, rather, that *re judicata* precluded its re-litigation. As Washington County Hospital explains in its brief, Roane might have employed the doctrine of judicial estoppel if he had consented to appellees' 1998 motions to transfer the case to circuit court, and, once there, appellees had filed a motion to dismiss on the grounds that the circuit court lacked jurisdiction to hear the claim. That, however, is not what happened in this case. Roane pursued his

claim, to varying degrees, in two court systems and then ended the litigation by voluntarily dismissing his claim in one of those jurisdictions.

JUDGMENT AFFIRMED;

APPELLANT TO PAY COSTS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. CCB-98-3191

CHARLES H. ROANE,

v.

WASHINGTON COUNTY HOSPITAL, et al.

MEMORANDUM

Now pending before this court is a Motion to Reopen Administratively closed Case filed by plaintiff Charles H. Roane on July 10, 2001. This matter has been fully briefed and no hearing is necessary. See Local Rule 105.6.

It would be an understatement to say that this case has a complicated procedural history. Most of that history is set forth in Roane v. Washington County Hospital, et al., 769 A.2d 263 (Md.App. 2001), and will only be summarized here. Roane first filed a medical malpractice case in this court in April 1996, which was docketed as B-96-1322. After defendants Washington County Hospital and Dr. Abdullah moved to dismiss because the claim had not been submitted to arbitration, plaintiff voluntarily dismissed that action. In September 1996 Roane filed his claim in the Maryland Health Claims Arbitration Office, pursuant to MD. Code Ann., Cts. & Jud. Pro., § 3-2A-04. Discovery proceeded for approximately two years, at which point the parties agreed to waive arbitration and litigate the matter in the Circuit Court for Washington County. In September 1998, however, Roane filed in this court a second complaint that mirrored B-96-1322, which was

docketed as CCB-98-3191 (the current action). The defendants again moved to dismiss, this time on the grounds that the waiver of arbitration applied only if the case were litigated in state court. I agreed with the defendants and in December 1998 transferred the case to the Circuit Court for Washington County, where it was docketed as Civil Action No. 21-C-98-005882. Apparently, "[t]he parties construed this transfer as a de facto refiling of the suit in State court." Roane, 769 A.2d at 265.

After the transfer, Roane attempted, but failed, to obtain a stay of the state court proceedings. The case then proceeded simultaneously in both federal and state court, with plaintiff appealing this court's ruling to the Fourth Circuit, while answers and substantive motions were filed by the defendants in state court. The Fourth Circuit ruled in September 1999 that the Maryland Health Care Malpractice Claims Act did not allow enforcement of the forum selection clause contained in the waiver of arbitration, upon which the transfer to state court was founded. Accordingly, my order to transfer was vacated, and the case was remanded for further proceedings in U.S. District Court.

In November 1999 Roane voluntarily dismissed the second federal complaint, CCB-98-3191, which had been reinstated by the Fourth Circuit's ruling. Apparently, he did so because trial had been scheduled in the Circuit Court for Washington County in June 2000.[3] This voluntary dismissal closed the federal court action.[4] Later in the same month,

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[1] He did not, as he might have, simply request a stay of any federal proceedings.

[2] Roane now disputes whether this dismissal, which I approved, was effected under Fed. R.Civ.P. 41 (a) (1) (i) or 41 (a) (2). I agree with the Court of Special Appeals that the dismissal was pursuant to 41 (a)(1)

Washington County Hospital moved to dismiss the state court case on the ground that the two voluntary dismissals in federal court constituted an adjudication on the merits, which operated as res judicata for purposes of the claims pending in state court. The Circuit Court for Washington County did not adopt this argument, but nonetheless dismissed the action in March 2000 and transferred it back to the federal court, holding that the "law of the case" doctrine deprived it of jurisdiction. The Circuit Court reasoned that the Fourth Circuit's September 1999 ruling retroactively deprived it of jurisdiction over any part of the case.

After the Circuit Court for Washington County transferred the case back to this court, CCB-98-3191 was "reopened" and the transferred case was docketed as such. Upon plaintiff's indication that he would appeal the Circuit Court's ruling, the federal action was stayed and administratively closed by order dated April 28, 2000, pending the outcome of the state appeal. Pursuant to a request from the Clerk of the Circuit Court for Washington County to transfer the case back to the state system for purposes of the pending appeal, the case was transferred again to the state court on July 25, 2000.

On March 29, 2001, the Court of Special Appeals ruled on the state appeal. That court affirmed the Circuit Court's dismissal, but on grounds different from those relied on by the lower court. Roane, 769 A.2d at 267-69. The Court of Special Appeals adopted Washington County Hospital's argument before the Circuit Court that the second dismissal in federal court constituted an adjudication on the merits, and the state action was therefore barred by the doctrine of res judicata. Id.

Sorting through this complicated history, several points become apparent. First, the Fourth Circuit's vacation of this

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(i).

court's transfer of the case to state court effectively negated any transfer that had previously occurred. This result is consistent with the opinion of the Court of Special Appeals, which treated the state case as a separately filed action proceeding parallel to the federal action, and not as a continuation of the federal action. Id. Second, although not specifically stated by the Court of Special Appeals, its March 2001 ruling that the state court action was barred by res judicata effectively vacated the Circuit Court's order to transfer the case back to this court. The Circuit Court's transfer order was founded on the belief that there had been an invalid transfer from the federal system to the state system, and the case must therefore be returned to the federal system. The Court of Special Appeals, as discussed above, treated the state case not as an outgrowth of an invalid transfer, but in effect as a separately filed state court action. Therefore, when the Court of Special Appeals ruled that the state action was barred by the doctrine of res judicata, this concluded the state case, and precluded any further transfer. A fully adjudicated case cannot thereafter be transferred to another court system.

Looking then to the stay and administrative closing in this court that is the subject of plaintiff's motion, it becomes apparent that the stay and closing only applied to the state case that was transferred to this court from the state court in April 2000 and then transferred back in July 2000 (Civil Action No. 21-C-98-005882), and not to the federal action, which had already been dismissed. Although the transferred action was docketed in this court as CCB-98-3161, it was a separate case from the second federal court complaint that was filed in September 1998 and dismissed in November 1999. Because the state case subsequently was transferred back to the state system and fully disposed of there by the Court of Special Appeals, the stay and administrative closing ceased to have any meaning or effect with regard to 98-CCB-3161.

Therefore, the pending motion will be denied, because the transferred state case that was the subject of the order granting the stay and administrative closing is no longer before this court. In the alternative, if this case were reopened, it would have to be dismissed on the ground of res judicata pursuant to Fed.R.Civ.P. 41 (a) (1). See Manning v. South Carolina Dept. of Highway and Public Trans., 914 F.2d 44, 47 (4th Cir. 1990).[5]

A separate order follows.

3/25/02
Date

S/ Catherine C. Blake
United States District Judge

[3] The Plaintiff suggests that if the case were reopened, he would file a Rule 60(b) motion for relief from the November 1999 dismissal. He does not, however, proffer any viable basis for this court to grant such a motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. CCB-98-3191

CHARLES H. ROANE,

v.

WASHINGTON COUNTY HOSPITAL, et al.

ORDER

for the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

(1) plaintiff's Motion to Reopen Administratively Closed Case is DENIED;

(2) copies of this Order shall be mailed to counsel of record; and

(3) the clerk of the court shall finally CLOSE this case.

3/25/02
Date

S/ Catherine C. Blake
United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1383

CHARLES H. ROANE,

Plaintiff-Appellant,

versus

WASHINGTON COUNTY HOSPITAL; A.F. ABDULLAH,

Defendants-Appellees,

LIBERTY MUTUAL INSURANCE COMPANY,

Movant.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Catherine C. Blake, District Judge. (CA-98-3191-CCB)

Submitted: August 30, 2002 Decided: September 20, 2002

Before NIEMEYER, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Mark A. Cronin, CRONIN & SCARDINO, Fort Washington, Pennsylvania; Kevin M. Fitzpatrick, LAW OFFICE OF KEVIN M. FITZPATRICK, P.C., Fairfax, Virginia for Appellant. Michael I. Joseph, ADELMAN, SHEFF & SMITH, L.L.C. Rockville, Maryland; Conrad W. Varner, VARNER & GOUNDRY, Frederick, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Charles H. Roane appeals the district court's order denying his motion to reopen his medical malpractice action. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Roane v. Washington County Hosp., No. CA-98-3191-CCB (D. Md. Mar. 25, 2002). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 29, 2002

No. 02-1383
CA-98-3191-CCB

CHARLES H. ROANE,

Plaintiff-Appellant,

v.

WASHINGTON COUNTY HOSPITAL; A.F. ABDULLAH,

Defendants-Appellees,

LIBERTY MUTUAL INSURANCE COMPANY,

Movant.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and

is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/S/ Patricia S. Connor